United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1364

To be argued by
JOHN J. KENNEY

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1364

UNITED STATES OF AMERICA,
Appellee,

—v.—

EDWARD PASTOR and MARTIN WEINER,
Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Edward Pastor and Martin Weiner appeal from judgments of conviction entered in the United States District Court for the Southern District of New York on September 21 and July 27, 1976, respectively, following a twelve-day trial before the Honorable Constance Baker Motley, United States District Judge, and a jury.

Indictment 76 Cr. 253,* filed on March 12, 1976, charged the defendants Pastor and Weiner in six counts

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* Indictment 76 Cr. 253 superseded earlier indictments 75 Cr. 753 and 76 Cr. 145. Indictment 76 Cr. 145, which made changes and additions to the earlier indictment, was filed on February 11, 1976, and dismissed by the Court on February 20, 1976 for failure to comply with those principles set forth in *United States* v. *Estepa*, 471 F.2d 1132 (2d Cir. 1973). The Government does not, at this time, intend to proceed on Indictment 75 Cr. 753.

The indictment included in the appellants joint appendix is not the indictment on which appellants were tried but is indictment 76 Cr. 145 which was dismissed.

"A" refers to pages in the Appellants' joint appendix.

with conspiring to obtain phendimetrazine and phentermine, controlled substances under the Comprehensive Drug Abuse Prevention and Control Act of 1970 (Count One), and with actually obtaining large quantities of phendimetrazine (Counts Two-Five) and phentermine (Count Six) without being properly registered and by misrepresentation, forgery and fraud, in violation of Title 21, United States Code, Sections 812, 841(a)(1), 843(a)(2), 843(a)(3) and 846.

Trial commenced on May 18, 1976, and on June 4 the jury returned a verdict of guilty on Counts One, Five and Six as to both defendants but was unable to reach a verdict as to the remaining counts. The Court declared a mistrial as to Counts Two, Three and Four.

On July 26, 1976, the Court sentenced Weiner to six months imprisonment on Counts One, Five and Six, suspended the execution of sentence, and placed him on probation for a period of two years. A committed fine of $3,000 was imposed on Count One, to be paid within 30 days.

On September 17, 1976, the Court sentenced Pastor to six months imprisonment on Count One and four years on Counts Five and Six. The sentence imposed on Counts Five and Six, to be served concurrently, was suspended by the Court and Pastor was placed on probation for a period of five years. A committed fine of $5,000 was imposed on Count One. The fines and prison term imposed by the Court were stayed pending this appeal.

Statement of Facts

A. Synopsis

In 1973 and 1974, Pastor and Weiner, Philadelphia pharmacists, obtained more than 5 million units of phendimetrazine and phentermine, commonly known as "ups" or "speed," by false representations and forgery. These drugs were diverted from the regular channels of commerce and were used for sale on the street or black market where the retail price would be $5,000,000, despite the cost to the defendants of less than $100,000.

The defendants subverted the controls intended to prevent such misuse by posing as a licensed Philadelphia physician registered with the Drug Enforcement Administration ("DEA") to acquire and distribute controlled substances. Forged letters were submitted to the manufacturer in the name of Horace Johnson, M.D., ordering large quantities of the drugs. The 5 million units were received by the defendants. The record is silent as to their final distribution and use.

B. The Government's Case

1. Early Transactions—the Scheme is Hatched

In April 1973, Douglas Berry told Charles Fernald that he would be contacted by a man from Philadelphia who had been purchasing large quantities of anoretics *

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* Generally prescribed for weight reduction, when sold illegally anoretics are frequently a substitute for amphetamines as they have approximately the same effect. They are considered less desirable among such drug users as they may have very unpleasant after effects. Affidavit of William Vodra, former Assistant Chief Counsel DEA, 1972-74, dated January 26, 1976 at pp. 4, ¶ 9 and 6-7 ¶ 14; Ex. 3 (hereafter the "Vodra" Affidavit); (140a, 142a-43a).

in Danbury, Connecticut.* (Tr. 428-29).** Berry told Fernald if a sale was completed the invoice was to be made out to Dr. Horace Johnson. (Tr. 437-38). Later in April, Edward Pastor called Fernald and it was agreed that Fernald would bring a sample shipment of phendimetrazine to Pastor in Philadelphia.*** (Tr. 431-32).

On May 4, 1973, Fernald flew to Philadelphia where he met Pastor and Martin Weiner. He delivered 100,000 35 milligram ("mg.") tablets of phendimetrazine to Weiner, who placed the package in his car.**** (Tr. 433-434, 437-38; GX 7C). Pastor, Weiner and Fernald then

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* Berry and Fernald were business partners in a drug distribution company, Wingate Sales Corporation, which was located at 33 Union Square West, New York, New York 10003. (Tr. 428; GX 7C).

** "Tr." refers to pages in the trial transcript; "GX" to Government exhibits admitted into evidence at trial.

*** Pastor, a resident of Philadelphia, had an indirect interest in two drug stores: Pastor's Pharmacy, 11 North 11th Street, Philadelphia and Pastor's Pharmacy, 126 South York Road, Hatboro, Pennsylvania. (Tr. 1604-5). While both Pastor's pharmacies were in fact registered with DEA to receive and dispense controlled substances, none of the drugs concerned here were received by these stores (Tr 1250-55, 1604-11, 1620-21, 1631-32)

**** At this time, neither phendimetrazine nor phentermine were listed as "controlled substances", although the federal register had published the Government's intent to place them on Schedule III and IV, respectively, in the near future. See, 21 U.S.C. § 812, Tr. 1348-49, 1733-34; Federal Register, Vol. 38, No. 28, February 12, 1973. See also Vodra Affidavit p. 5, ¶ 12, Ex. 1 (142a, 150a). In fact, phendimetrazine became a controlled substance on June 15, 1973 and phentermine, on July 6, 1973. (Tr. 278-79); Federal Register, Vol. 38, No. 115, June 15, 1973 and No. 129, July 6, 1973; Vodra Affidavit, pp. 11-12, ¶ 22, 25; EX. 1, 147a, 148a-49a).

Once these drugs became controlled substances, to distribute or acquire them a person would be required to register with the DEA, to maintain effective controls over the drugs to prevent their diversion from legitimate channels of commerce, and use and maintain records showing acquisition and distribution. Registrants are subject to audit by DEA. (Tr. 275-76, 1574-77).

retired to the pilot lounge at the private aircraft terminal where Pastor informed Fernald that he wanted 100 mg. time release capsules despite a possible 4-6 week wait for delivery. He did not want to sign any receipts or receive invoices, but stated that he and Weiner were in a position to do a sizable business and would pay promptly either in cash or by certified check. Pastor gave Fernald $550 in cash for the tablets.* (Tr. 435-38, 480; GX 22).**

On June 12, 1973, Fernald delivered a shipment of 500,000 35 mg. phendimetrazine tablets to Pastor in the garage of his apartment house in Philadelphia. On that occasion, Pastor told him he would prefer 100 mg. pills and that he represented several reducing clinics that used large quantities, mentioning Dr. Horace Johnson as running a clinic using 1800-2000 pills daily. (Tr. 473-76, 79; GX 8C).

On June 18, 1973, Pastor and Weiner met Fernald at Pennsylvania Station in Manhattan. Pastor paid Fernald $3,125 in cash for this shipment. (Tr. 483; GX 8C, 35).

On June 23, 1973, Weiner drove to Manhattan where he picked up a shipment of 800,000 35 mg. phendimetrazine tablets and paid Fernald $4,775 in cash. Fernald, after consultation with Berry, sent the Wingate invoice to "Tri State Wholesalers" using the "BNDD" number and

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* The "street" value of a single tablet of phendimetrazine during 1973-74 was $1. (Tr. 1796-97).

** Weiner had an indirect interest in Tri State Wholesalers, Inc., a drug retailer and wholesaler with locations in Philadelphia and Chester, Pennsylvania. While both of these locations were also registered with DEA to receive and distribute controlled substances, none of the controlled drugs with which this case is concerned appeared on the records of Tri State as having been either received or dispensed. (Tr. 1578, 1590-92, 1595).

Pennsylvania drug registration number that Berry had supplied.* Weiner called Fernald at Wingate and told him this invoice should not have been sent to Tri State but was supposed to be sent to a doctor whose name he would supply. (Tr. 485-90, 492-93, 956-57; GX 9C, 35).

On July 26, 1973, Fernald delivered 100,000 100 mg. phendimetrazine time-release capsules to Pastor in Philadelphia. Pastor had ordered these capsules at the initial meeting in May. Pastor paid Fernald $2250 for this delivery on August 3, 1973. (Tr. 494-500; GX 10C, 35).

In August, after an abortive effort to meet Pastor at the Danbury, Connecticut, airport, Fernald drove to Philadelphia and delivered 1,000,000 35 mg. phendimetrazine tablets to Pastor. (Tr. 500-04). The Wingate invoice for this shipment was backdated to June 1, 1973, to make it appear to have occurred before this drug became a controlled substance on June 15, 1973. (Tr. 500-05; GX 11C).

Although each transaction was recorded by Fernald on a Wingate invoice addressed to Dr. Horace Johnson, the customer's copy was destroyed. (Tr. 453-54, 706,07; GX 7C-12C, 14C-17C, 19C-21C). Dr. Johnson, an elderly Philadelphia physician who was acquainted with Pastor, knew nothing of these transactions and did not receive these drugs or, in fact, any other drugs, through Pastor, Fernald or Wingate. (Tr. 1289). At no time was Weiner himself properly registered with DEA to receive or dispense such drugs. (Tr. 1248-50).**

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* "BNDD" refers to the former Bureau of Narcotics and Dangerous Drugs, presently the Drug Enforcement Administration of the Department of Justice.

** The record is silent as to Pastor, but the fair inference from the whole record is that he was not personally registered with DEA.

2. Doctor Johnson's Letter—A Forgery

In October 1973, Fernald informed Pastor he had a supplier for 105 mg. time-release capsules of phendimetrazine. Pastor ordered 250,000 capsules. He gave the name Horace Johnson and the BNDD number to be used and told Fernald he could use a great deal more than 250,000 if he could get them. Fernald was told to ship the drugs to Dr. Horace Johnson, c/o Edward Pastor, Hopkinson House, Philadelphia. Pastor was aware that phendimetrazine was a controlled substance and told Fernald he was licensed to handle it. (Tr. 508, 510-514, 700-06; GX 12A, C).

Fernald placed the order with the Vitarine Co., Inc.,* ("Vitarine"), a drug manufacturer. When Fernald received the Vitarine invoice on October 12, 1973, he made up a Wingate invoice for his records but, at Pastor's instruction, did not send a copy to Johnson.** He did, however, notify Pastor by telephone that the drugs had been shipped. (Tr. 706-7). Fernald was subsequently paid $5,750 in cash at Pastor's home in Philadelphia. (Tr. 710-11; GX 35).

When Fernald attempted to place further orders on behalf of Pastor with Vitarine, he was told they would

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* Vitarine and Garden Laborators, Inc. ("Garden Laboratories") were located at the same address and were both subsidiaries of West Chemical Products, Inc., 227-15 North Conduit Avenue, Springfield Gardens, New York 11412. While they appeared to alternate in filling Wingate orders, for the purpose of this brief they are both referred to as "Vitarine".

** This practice became routine. Both the Wingate and Vitarine invoices indicated a sale and shipment to "Horace Johnson, M.D." Dr. Johnson's BNDD registration number appears on the face of the Vitarine invoice (GX 12A, C, 26; Tr. 1270). Dr. Johnson did have a registration on file with the Drug Enforcement Administration but it expired on December 31, 1972, and was not subsequently renewed. (Tr. 1242-44; GX 25).

not be accepted without a written request from Dr. Johnson. Fernald relayed this information to Pastor, and on November 23, 1973, Fernald received in New York a letter on Dr. Johnson's letterhead containing Dr. Johnson's BNDD number and a signature of Horace Johnson, confirming the telephone order of 200,000 phendimetrazine capsules monthly for six months. Fernald sent a copy of the letter to Vitarine, placing the order by telephone. (Tr. 711-718; GX 13F). This letter was a forgery since neither the signature, nor indeed, the stationery, was Dr. Johnson's. (Tr. 1289-90).

Thereafter, five shipments of 200,000 capsules each were sent by Vitarine to Pastor pursuant to the forged "Dr. Johnson" letter. (Tr. 724-45, 753; GX 14A, B, C, & F, 15A, B, C,& H, 16B & C, 17B, C, H and 21A, H). Two of these shipments were paid in cash by Pastor at his home in Philadelphia. (Tr. 724, 729-30). Weiner made payment for at least two shipments: $3,954.70 in cash at the offices of Tri State Wholesalers in Chester, Pennsylvania on March 26, 1974 and $4,400 in cash in Philadelphia in April. (Tr. 736, 744, 957-58; GX 35).

3. Pastor Poses as Dr. Johnson

Pastor requested that these shipments be made through APA Transport Corporation ("APA"), which has a terminal in Philadelphia. As these shipments were directed to Dr. Johnson's address, Pastor requested that the shipments be held at the terminal to be picked up. Thereafter, on two occasions he went to the APA terminal

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* Pastor told Fernald he had a connection at APA. In fact, he twice attempted, unsuccessfully, to "tip" the manager of the terminal, once with $50 and a second time with $20. (Tr. 718-719, 1650-52).

in Philadelphia, identified himself as Dr. Horace Johnson and picked up the shipment, paying the freight charges. On two other occasions Pastor called the terminal, identified himself as Dr. Johnson, and arranged to have someone else pick up the drugs. (Tr. 1641-57).

4. A Second Forged Letter

On April 18, 1974, after Fernald had informed him it would be necessary, Pastor sent to Fernald in New York a second letter on the stationery of Horace Johnson, M.D., ordering two shipments of phentermine containing 500,000 8 mg. tablets to be sent in the first and second weeks of June, 1974.* (Tr. 750-51; GX 18E). This letter was a forgery. (Tr. 1291-92). Fernald placed the order with Vitarine, which would not fill it without the letter. The first phentermine shipment of a half-million tablets was sent to Pastor on April 29, 1974, and Fernald was paid by Pastor, on May 9, in cash. (Tr. 754-759; GX 19A, B, C, & H). The second phentermine shipment was sent on May 31, 1974, and Fernald was paid for this shipment by Weiner on July 8, 1974, in the Tri State offices in Chester, Pennsylvania. (Tr. 761-64; GX 20B, C, & H).**

5. The Danbury Transactions

Pastor also placed orders at Danbury Pharmacal, a drug manufacturer located in Danbury, Connecticut, in 1973 and 1974, in the name of Horace Johnson, M.D. On one occasion, Weiner accompanied by Pastor went to

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* Phentermine, like phendimetrazine, had a "street value", at that time of $1 per unit.

** Pastor requested and received two shipments of caffenamine in a similar manner, 92,000 units for $736 in March of 1974 and 50,000 units for $450 in May of 1974. (Tr. 747-49, 755-58; GX 17C, 19C, 35). Caffenamine is not a controlled substance.

Danbury to effect a transaction, and at least one shipment was sent to Tri State Wholesalers in Pennsylvania. (Tr. 1376-90; GX 31).

In June of 1973, Weiner called Berry, at that time an employee of Danbury Pharmacal, at home. Explaining that DEA was conducting an audit of controlled drugs acquired and distributed by Tri State, he asked Berry to remove a specific invoice from Danbury's file. Berry refused. (Tr. 1394-98; GX 31). The audit of Tri State revealed that 213,000 phentermine tablets shipped by Danbury on February 6, 1974, to Tri State were not reflected in Tri State's records in June of 1974. (Tr. 1596-97).

6. Pastor Confesses

Joseph Vigna, a Special Agent of the Drug Enforcement Administration, interviewed Pastor on December 9, 1974. Pastor told Vigna at that time he was involved in the diversion of drugs, that he had placed all the telephone calls ordering drugs from Wingate, where he had spoken to Fernald and Berry and that some but not all of the Wingate payments were made by him. While he shared in the profits from the sale of these drugs, he was not sure where the drugs went. (Tr. 1799-1800).*

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* Subsequently on February 26, 1975, Pastor made the following incredible statements to Vigna: He was present when the drugs were picked up but he did not know what type of drugs they were. He was present when envelopes were exchanged but he did not know what was in the envelope. He did not know where the drugs went after they were picked up. He believed that a man named "Baba" got the drugs but he was not sure. All he knew was the drugs were given to men who put them in brand-new Chevrolets. (Tr. 1800-1801).

C. Defense Case

Neither Pastor nor Weiner called witnesses or testified in their own behalf.

ARGUMENT

POINT I

The District Court Properly Ruled That the Addition of Phendimetrazine and Phentermine to the Schedule of Controlled Substances Was Constitutional.

In an attack upon the very legislative structure upon which the Federal law enforcement of narcotics and other drug abuses is based, the defendants contend that the District Court erred in rejecting their argument that Congress unconstitutionally delegated legislative authority by allowing the Attorney General to add to, delete from or transfer drugs among schedules of controlled substances. They further assert that even if the delegation is valid, the standards established for the Attorney General's consideration are unconstitutionally vague and were not followed in this case. The District Court properly found these claims to be without merit, in a lengthy and carefully reasoned memorandum opinion. (Op. #44476 dated May 26, 1976, 408a-46a).

The Comprehensive Drug Abuse Prevention and Control Act of 1970 ("the Act") established five classes of controlled substances, and sets forth various controlled substances to be listed within each schedule. In addition, Congress empowered the Attorney General to add, delete or transfer drugs, 21 U.S.C. § 811(a), and further provided detailed findings to be made in determining the placement of a drug or substance within a given schedule.

21 U.S.C. § 812(c). In addition, Congress also listed eight specific factors to be considered by the Attorney General in any determination to update the schedules by adding, removing, or transferring drugs. 21 U.S.C. § 811(b). The defendants claim that any addition to the schedules enacted by Congress is the result of an unconstitutional delegation of legislative authority, and thus assert that their indictment for dealing in phendimetrazine and phentermine, which were added to Schedules III and IV by the Attorney General on June 15, 1973, and July 6, 1973, respectively, should be dismissed.

A. There Was no Unconstitutional Delegation of Legislative Power

It is clear that Congress cannot delegate its power to legislate, *Panama Refining Co.* v. *Ryan*, 293 U.S. 388 (1935); *Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935). This case, however, does not involve a delegation of legislative power. Both *Panama Refining* and *Schechter Poultry* "dealt with delegations of power to make federal crimes of acts that never had been such before and to devise novel rules of law in a field in which these had been no settled custom." *Fahey* v. *Mallonee*, 332 U.S. 245, 249 (1947). Such is not the case here. The Attorney General is empowered by the Act neither to make new crimes nor to devise new rules in an area where there is no custom. The crime of dealing in narcotics with specified deleterious attributes has been defined by Congress; the Attorney General merely lists new products that meet the specific criteria established by Congress.

The power to legislate is not impermissibly delegated when Congress sets forth the general legislative policy in

a statute and defines the boundaries of delegated power. In particular, the grant of power to the executive branch to fill in details within already established boundaries is not unconstitutional. *American Power & Light Co.* v. *S.E.C.*, 329 U.S. 90, 105 (1946). The procedure of designating products in accordance with standards outlined by Congress in the context of the Federal Food, Drug and Cosmetic Act, was found constitutional in *Byrd* v. *United States*, 154 F.2d 62 (5th Cir. 1946).*

As the defendants acknowledge, Congress may provide criminal sanctions for violations of the rules or regulations it has empowered an administrative agency to enact. *United States* v. *Grimaud*, 220 U.S. 506 (1911); *United States* v. *Brumage*, 377 F. Supp. 144, 150 (E.D.N.Y. 1974). What they fail to recognize is that drugs have always been a regulated field with criminal sanctions. Thus, this is simply not a case where Congress allowed the executive branch to dream up new crimes on a clean state. In addition, Congress provided for precise definitions of the classes of crimes associated with designated attributes of various drugs, and further detailed the procedures to be followed by the Executive Branch in making classifications. Indeed, delegations of authority to name particular substances as prohibited drugs have been upheld within the framework provided by Congress. Sutherland, *Statutory Construction* § 317 (3d ed. 1943); *Iske* v. *United States*, 396 F.2d 28, 30 (10th Cir. 1968);

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* In upholding that delegation the Court stated:
"Congress stated the general rule, and left the administrator the duty of ascertaining what particular colors should be listed. This procedure meets the test required by the due process clause of the Fifth Amendment." Id. at 64 (footnote omitted).

White v. *United States*, 395 F.2d 5 (1st Cir.), *cert. denied*, 393 U.S. 928 (1968).*

The only case cited by the defendants in support of their argument that this delegation was unconstitutional is *Howell* v. *State of Mississippi*, 300 So. 2d 774 (1974). In *Howell*, the crime alleged was possession of amphetamines in violation of the Mississippi version of the Controlled Substances Act. The defendant complained that the administrator of that act had exercised an unconstitutional delegation of legislative power by rescheduling amphetamines from Schedule III to Schedule II thereby increasing the penalty. Based on its interpretation of the Mississippi Constitution, the Mississippi Supreme Court agreed.

As the District Court specifically noted (411e, 412) while the delegation doctrine has had absolutely no currency in the federal courts since the decisions of the "New Deal" Supreme Court in *Panama Refining*, *supra*, and *Schechter Poultry*, *supra*, it still thrives on the state level. Louis Jaffe, *Judicial Control of Administrative Action*, p. 73 (1965). The *Howell* case is further distinguishable because it was specifically based on the emphatic language in the Mississippi Constitution providing that "No person or collection of persons, being one or belonging to one of these departments, shall exercise any power properly belonging to either of the other"—a provision without counterpart in the Federal Constitution.

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* In *Iske*, *supra*, the Court specifically recognized the necessity in the area of drug control of granting the Administrator the power to add new substances:

> "This must necessarily be so, for with new drugs being discovered and introduced at an unprecedented rate, it would be impossible for Congress to determine beforehand those drugs to which it wishes a particular policy to be applied and to formulate specific rules for each situation." Id. at 31.

B. The Delegation to the Attorney General Did Not Violate the Due Process Clause

The defendants also contend, without any cited authority, that the delegation of this authority to the Attorney General violated the Due Process clause. The District Court properly rejected this contention. In the context of this statute, it is clear that the power of the Attorney Generel in scheduling drugs is far from omnipotent. The Attorney General is required to make findings concerning a drug's potential for abuse, its legitimate medical uses, and its tendency to cause physical and psychological dependence before a drug is placed in a schedule.* The legislative history further makes it clear that because of a fear that the Attorney General would be granted too much power, the power to schedule drugs was divided between the Attorney General and the Secretary of Health, Education and Welfare ("HEW").**

Thus, the Attorney General does not have absolute discretion to schedule a drug. Section 811(b) of the Act

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* 21 U.S.C. § 812(b).

** "Considerable controversy arose during the hearings over this provision of the bill, with respect to the proper role of the Attorney General and the Secretary of Health, Education and Welfare in making determinations concerning which drugs should be controlled. The reported bill strikes a balance between the extent to which control decisions should be based upon law enforcement criteria, and the extent to which such decisions should be based on medical and scientific determinations. The bill provides that the ultimate authority for decision as to whether or not drugs should be controlled, and the schedule in which they are to be placed, shall rest with the Attorney General, based upon all the evidence, with all scientific and medical determinations being made by the Secretary of Health, Education and Welfare, and these determinations being made binding upon the Attorney General." H. R. Rep. No. 91-1444, Sept. 10, 1970, quoted in 1970 U.S. Code, Cong. and Admin. News, p. 4589.

gives HEW Secretary primary responsibility for scientific and medical aspects of the scheduling decision.* The Secretary is directed to make a scientific and medical evaluation of the scheduling proposal and to recommend to the Attorney General in which, if any, schedule the drug should be placed. The Secretary's medical and scientific evaluation is binding on the Attorney General and if the Secretary recommends that a drug not be scheduled, the Attorney General cannot schedule it. Further, any rule proposed by the Attorney General, adding a drug to the Controlled Substances list, must be made on the record after the opportunity for a hearing. *United States* v. *Benish*, 389 F. Supp. 557, 558 (W.D. Penn.), *aff'd* 523 F.2d 1051 (3rd Cir. 1975), *cert. denied*, 424 U.S. 954 (1976). Following that, the decision to schedule a drug is subject to judicial review pursuant to Title 21, United States Code, Section 877.

It is, therefore, clear that the restrictions placed upon the Attorney General's power to add drugs to the controlled substances list sufficiently insure that his actions will be based on scientific data and subject to both public and judicial scrutiny. As the District Court noted in this portion of her careful opinion (Op. pp. 10-14, 417e-21e), the "specter" of a "prosecutor creating crimes by fiat and then bringing to bear the severe penalties provided by statute in pursuit of his own personal predictions" simply does not exist. The due process claim was properly denied.

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* 21 U.S.C. § 811(b) gives the HEW Secretary responsibility for making binding recommendations on five of the eight factors on which the Attorney General's decision must rest, and the same responsibility for scientific and medical aspects of the other three factors.

C. The Statutory Guidelines Are Not Vague and Were Followed in This Case

Defendants further contend that the factors that the Attorney General and the Secretary of HEW must consider are unconstitutionally vague, and in any event those factors were not properly considered in the administrative proceedings leading to the classification of the drugs in this case. In particular, the defendants argue that the term "potential for abuse" is vague and was not defined in the statute. The District Court properly found that the factors were fully defined in the legislative history of the Act, and that the Attorney General fully complied with the Act.

In support of the contention that the term "potential for abuse" is so vague as to violate due process requirements, the defendants cite a memorandum by Dr. Henry E. Simmons, who noted that he found the eight factors "for the most part vague and redundant." Dr. Simmons' subjective opinion is not only irrelevant, but the legislative history, which is not mentioned in Dr. Simmons' memorandum, points out that in evaluating the potential for abuse the Attorney General should consider the following factors: whether the drug is being taken in amounts sufficient to create a hazard to health; whether there is significant diversion of the drug from legitimate drug channels; whether people are taking the drug on their own initiative without advice from a doctor; whether the drug is a new drug closely related to a drug that has already been listed as having a potential for abuse; and misuse of the drug resulting in injuries and suicides. 1970 U.S. Code Cong. and Admin. News pp. 4601-02. Additionally, the term "potential for abuse" is derived from earlier narcotic statutes that employed the same criteria in defining that term. The same standard for defining "poten-

tial for abuse" was sustained in both *White* v. *United States, supra,* and *Iske* v. *United States, supra.**

The defendants' final contention here is that the eight factors required to be considered were not in fact considered by the Attorney General. The District Court properly determined, on the contrary, that the Attorney General did consider the eight factors.

The Court's findings were based upon an affidavit of defendant Pastor's counsel, an affidavit of William Vedra, who was Assistant Chief Counsel of the Bureau of Narcotics and Dangerous Drugs** (BNDD) from 1972 to 1974, and documentary evidence submitted by both defendants and the Government. Based on that information, the District Court found that during the period 1971 to 1974, the BNDD Director made his decision to schedule a drug after receiving oral and written presentations from a committee appointed to evaluate any proposals. The Committee consisted of representatives of the Drug Control Division ("SCID") of BNDD's Office of Scientific Support, whose function was to analyze pharmacological aspects of the drug considered for scheduling and to receive and evaluate reports of the drug's abuse that were generated by the medical community; the BNDD

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* In addition, since the drugs in *this* case clearly have "potential for abuse," and since neither defendant alleges a First Amendment interest, they do not have standing to assert the vagueness of the term. *United States* v. *Mazurie*, 419 U.S. 544, 550 (1975); *Parker* v. *Levy*, 417 U.S. 733, 756 (1974); *Broadrick* v. *Oklahoma*, 413 U.S. 601, 608 (1973).

** The Attorney General delegated his authority to the Director of the Bureau of Narcotics and Dangerous Drugs, now DEA. 28 C.F.R. § 0.100. The Secretary of HEW delegated his authority to the Assistant Secretary for Health. 21 C.F.R. § 2.120.

Office of Compliance, which was concerned with appraisal of the diversion and illicit traffic of legitimate drugs; the BNDD Chief Counsel's Office and the Chief Medical Officer of BNDD.

At the end of 1972, the Food and Drug Administration (FDA) of HEW conducted a review of all weight reducing products, including phendimetrazine and phentermine. During December 1972, at a Senate hearing, the FDA announced that it would recommend placing most of the unscheduled weight reduction drugs in Schedule III of § 812. At this point, SCID began preliminary familiarization studies of the scientific and medical aspects of the weight reduction drugs. Much of the material that was used by FDA was unavailable to SCID because the FDA considered the information to be a trade secret and therefore barred from disclosure.*

On February 12, 1973, the FDA published a notice of its findings on the effectiveness of weight reduction drugs in the Federal Register. On February 15, 1973, Richard L. Seggel, HEW Acting Assistant Secretary for Health, recommended to John E. Ingersoll, the BNDD Director, that various weight reduction drugs, including phendimetrazine and phentermine, be classified as Schedule III controlled substances.

After receiving the recommendation, BNDD staff members assembled data concerning the abuse of the drugs in question. That data tended to show that anoretic or weight reduction drugs were being used to replace am-

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* It is the findings of the Secretary of HEW, however, with respect to scientific and medical aspects, that is binding on the Attorney General or his designate.

phetamines.* This corroborated the FDA finding that weight reduction drugs and amphetamines had a similar chemical structure and pharmacological profile. However, the SCID staff, which performed the familiarization tests without all of FDA's information, felt that perhaps FDA did not have sufficient information to support a scheduling proposal. Therefore on March 13, 1973, the BNDD advisory committee decided to meet with FDA to see if they had additional data to justify the scheduling. Following that, additional information was provided by BNDD by FDA, and on March 30, 1973, two doctors from SCID and Mr. Vodra from the Chief Counsel's Office met with FDA officials. As a result of that meeting, the BNDD representatives concluded that there was sufficient scientific and medical information to support a determination by the Director to schedule the drugs.**

On April 3, 1973, the BNDD advisory committee and other staff members met with BNDD Director Ingersoll to consider the scheduling of, *inter alia*, phendimetrazine and phentermine. The presentation to the Director was

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* 21 U.S.C. § 331(j) provides:

"The using by any person to his own advantage, or revealing, other than to the Secretary or officers or employees of the Department, or to the Courts when relevant in any judicial proceeding under this chapter, any information acquired under authority of sections 344, 348, 355, 356, 357, 360b, 374 or 376 of this title concerning any method or process which as a trade secret is entitled to protection."

** There were no minutes or memorandum of this meeting. The substance of the meeting was given in an affidavit of Mr. Vodra who was present at the meeting as the Assistant Chief Counsel of BNDD.

oral and minutes were not made. The only documentary evidence supplied to the Director consisted of the minutes of the March 13, 1973, meeting. The oral presentations consisted of a summary of the March 30, 1973, meeting with the FDA concerning the pharmacological profiles and other medical and scientific aspects of the drugs, information concerning the abuse of the drugs; the assessment of the impact on BNDD resources in regulating these drugs, and a description of the similarity between the experience with phendimetrazine and phentermine and the early appearance of amphetamines abuse in the United States.

Following that meeting, the Director concluded that there was sufficient evidence to justify placing phendimetrazine and phentermine on Schedule III, but since he did not want to waste BNDD resources in litigation he directed the Assistant Chief Counsel, Mr. Vodra, to meet the manufacturers to ascertain whether they could present evidence as to why the drugs should not be scheduled and whether they would institute litigation to block the scheduling. When only two manufacturers replied, the Director on May 1, 1973, signed notices of proposed rulemaking for phendimetrazine and other drugs. Those notices, together with the conclusions he had drawn from the advisory committee's presentation, were published in the Federal Register. Thereafter, when no objections were received for phendimetrazine, that drug was placed on Schedule III on June 12, 1973, by an order that incorporated the findings required by 21 U.S.C. § 812(B)(3).*

One manufacturer objected to placing phentermine on Schedule III and therefore preparations were made for a hearing pursuant to 21 U.S.C. § 811(a). The manu-

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* This fact was not published in the Federal Register until June 15, 1973, *supra*.

facturer, however, consented to placing phentermine on Schedule IV. On July 6, 1973, the Director signed an order placing phentermine on Schedule IV.

Defendants raise two objections to these findings. They argue that the Attorney General made no specific findings with respect to the eight factors to be considered and secondly, that the Attorney General considered unwarranted and irrelevant matters, particularly, the possibility of hearings and litigation in deciding to schedule the drugs and finally that there was insufficient evidence to establish a potential for abuse.

The District Court properly found the contentions to be meritless. Not only does the Act provide that "findings of fact by the Attorney General, if supported by substantial evidence, shall be conclusive," 21 U.S.C. §877, but there is no requirement that the Attorney General make specific findings with respect to the eight factors listed in 21 U.S.C. § 811(c). The statute merely requires that the Attorney General and the Secretary of HEW consider the factors. The purpose of this omission was clear, since when Congress required specific findings, it so specified, as in Sections 811(a) and 812(b) of Title 21. The District Court quite properly found that the Director's consideration of the cost of hearings and litigation was entirely proper. Not only were the manufacturers not contacted until after the Director concluded there was sufficient grounds to schedule the drugs, but the legislative history requires that the Attorney General consider "the economics of regulation and enforcement attendant" to a decision to schedule drugs. 1970 U.S. Code Cong. and Admin. News p. 4603. Finally, the argument that there was insufficient data to arrive at decision on potential for abuse is equally meritless. The legislative history makes it quite clear that:

> "The Secretary of Health, Education and Welfare should not be required to wait until a number of lives have been destroyed or substantial problems have already arisen before designating a drug as subject to controls of the bill." 1970 U.S. Code Cong. and Admin. News p. 4602.

In any event, the District Court found that BNDD had considered investigations by Texas law enforcement officials involving criminal trafficking in these drugs by physicians, reports of phentermine thefts from wholesalers and retailers, non-medical use by truck-drivers and reports that phentermine had a "street name" indicating it was becoming familiar to non-medical users. Based on this, the District Court properly refused to rule that the Director abused his discretion in scheduling phendimetrazine and phentermine.

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Finally, and as a general matter, the following should be noted. The defendants do not claim—nor could they—that the substances involved in this case are anything other than powerful drugs capable of inflicting extraordinary harm when placed in improper hands. Their attempts to undo the careful and purposeful steps taken to render the dealing, for profit, in these drugs subject to criminal sanctions should be viewed in with this in mind. As the Supreme Court noted in a different context

> "Congestion of cities and crowding of quarters called for health and welfare regulations undreamed of in simpler times. Wide distribution of goods became an instrument of wide distribution of harm when those who dispersed food, drink, drugs, and even securities did not comply with reasonable standards of quality, integrity, disclosure and care. Such dangers have engendered

> increasingly numerous and detailed regulations which heighten the duties of those in control of particular industries, trades, properties or activities that affect public health, safety or welfare."

Morisette v. *United States*, 342 U.S. 246, 254 (1952) (Jackson, J). Indeed, the Supreme Court has noted that the regulatory provisions of the Federal Food, Drug, and Cosmetic Act—containing regulations and aims not dissimilar from those of this Act—should be interpreted with particular liberality, even in criminal cases:

> "The purposes of this legislation thus touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection. Regard for these purposes should infuse construction of the legislation . . ." *United States* v. *Dotterweich*, 320 U.S. 277, 280 (1943).

See also *United States* v. *Park*, 421 U.S. 658, 668 (1975). The defendants' claim that the laws prohibiting their behavior are procedurally unconstitutional should be dismissed.

POINT II

Venue Was Properly Laid In The Southern District of New York.

The defendants claim on appeal, as they did at trial, that venue was improperly laid in the Southern District of New York. Their narrow view of the proof and the legal requirements of venue is incorrect. The evidence of the defendants' criminal activities in the Southern District of New York was more than sufficient to sustain

Judge Motley's ruling that venue was properly laid in the Southern District both as to the conspiracy (Count One) and substantive counts (Counts Five and Six) of which the defendants were convicted.

Venue for the trial of a conspiracy charge is properly laid in any district in which the agreement or any overt act occurred, *Hyde* v. *United States*, 225 U.S. 347, 359 (1912), even if the overt act is committed by a co-conspirator other than the defendant, *United States* v. *Campisi*, 248 F.2d 102, 107 (2d Cir.), *cert. denied*, 355 U.S. 892 (1957). Indeed, the defendants do not seriously contest venue on this count (Pastor Br. 54), and properly so. There is ample evidence to establish the commission of seven overt acts in furtherance of the conspiracy in the Southern District of New York. In order to further their illegal objective, Pastor and Weiner placed numerous calls into the Southern District from Philadelphia and elsewhere (see GX. 35). In addition, on June 18, 1973, the defendants met Fernald at Pennsylvania Station in New York to pay for a shipment of phendimetrazine that they had obtained through the use of the false information. (Tr. 483). Weiner himself drove into the Southern District to pick up a shipment of drugs. (Tr. 485-87). Moreover, the key to the success of the defendants' conspiratorial activity was their furnishing Fernald and Berry—in the Southern District—with a "cover" to be used in obtaining the pills: phony authorizations purporting to those of Dr. Horace Johnson, and Dr. Johnson's expired registration number. (Tr. 711-15, 750, 1289-91; GX 13F, 18E). With such activities occurring in the Southern District in furtherance of the conspiracy, there can be no question that venue was properly laid there on Count One.

Venue on the substantive counts, Counts Five and Six, is equally clear. The point bears emphasis that, quite

contrary to the assertions of the defendants (Pastor Br. 51), the offenses of which they were convicted were simply not "single act" violations. Rather, they were charged with and convicted of "obtaining" illicit drugs "by misrepresentation, fraud, forgery, deception, and subterfuge." Indeed, the requisite demonstration of the necessary elements of the crime could not be encompassed within a single act, but of necessity must be, and was, spread out over a continuous course of conduct in which the false representations, as well as the final receipt, occurred. The continuing nature of the illegal acts was made clear as early as May 1973, when Pastor emphasized to Fernald that he would buy as much phendimentrazine as Fernald could supply. (Tr. 35-38, 475-764, 510, 704). As a direct result of these and other entreaties Fernald turned to Vitarine as the source of the narcotics that are the focus of Counts Five and Six. After Fernald informed Pastor he could obtain 250,000 105 mg. time release capsules, Pastor's response was not only affirmative but that he could use a great deal more. (Tr. 510). Fernald could not get more from Vitarine without a written request containing the appropriate registration number. When this forged request was received, it ordered not one but a continuing supply of 200,000 capsules a month for 6 months! (Tr. 711-15; GX 13F) This was also the case with the second forged Johnson letter seeking a supply of phentermine (Tr. 749-51; GX 18E). Finally, Pastor discussed continuing deliveries with Fernald and told him that while he was away on vocation Weiner would take care of the business." (Tr. 704, 710-11, 957-58).

Furthermore, the record is entirely clear that the defendants themselves chose the Southern District of

New York, and in particular the drug distribution company of Wingate Sales Corporation at Union Square, as the focus of their continuing and ultimately successful efforts to illegally obtain drugs. Wingate, and in particular Fernald and Berry, were without exception the means and the conduit through which Pastor and Weiner arranged the ultimate transfer of the phendimetrazine charged in Count Five and the phentermine charged in Count Six. In addition, Weiner made two trips and Pastor made one to the Southern District of New York in which significant steps in their continuing efforts to obtain the drugs were enacted. (Tr. 483, 485-87). Finally, by the defendants own choice the key documents necessary to obtain the shipments of drugs charged in Counts Five and Six—that is, the forged Dr. Johnson letters—were sent to and maintained at the Wingate offices in New York City, and, again at the defendants' direction, copies were sent from New York City to Vitarine on Long Island.

From these facts two conclusions are clear.* First, the offense of which Pastor and Weiner were convicted

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* Although the defendants do not articulate it as a separate point, they do criticize the adequacy of the trial court's instructions to the jury on venue. Pastor Br. at 47. An examination of this Court's decision in *United States* v. *Jenkins*, 510 F.2d 495 (2d Cir. 1975), demonstrates that the charge was entirely adequate, and indeed was unduly favorable to the defendants. (Conspiracy Count, 480a-81a, 486a-87a, 493a-95a, 511a; Substantive Counts 512a-13a, 515a). First, while the defendants claims that the charge was imprecise, the charge as given was considerably more lucid than that approved in *Jenkins*, quoted in *id.* at 498. Second, as in *Jenkins*, the trial court did not instruct the jury that they need find venue only by a preponderance of the evidence, thus leaving "the jury free to make the perhaps natural assumption that the government had to prove venue . . . beyond a reasonable doubt." *Id.* Finally, this Court in *Jenkins* explicitly left open the "academic" issue whether venue is a matter to be decided by the jury at all. *Id.* at n. 4.

was a continuing one and thus was a proper object of the applicability of Title 18, United States Code, Section 3237(a), prescribing venue for the trial of any "offense" that is "begun in one district and completed in another, or committed in more than one district." Common sense, as well as the dictionary definition (see, e.g., The Random House Dictionary of the English Language 995 (unab. ed. 1967)) compel the conclusion that to "obtain" means to "get by effort" and to engage in a process of acquisition that includes activities leading up to an actual receipt or physical possession. Their "obtaining" activities not only proceeded on a continuing basis from May 1973 through June 1974 and culminated in the actual possession of the narcotics charged in Counts Five and Six, but also occurred in several districts, including the Southern District of New York, where they were properly prosecuted.*

Second, quite apart from the activities of Pastor and Weiner's cohorts in the Southern District, their own ac-

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* Indeed, quite arguably their crimes actually came to fruition in the Southern District of New York, among other districts, although such a degree of completion is not necessary to our argument. First, the jury could easily infer by a fair preponderance of the evidence, *United States* v. *Jenkins*, 510 F.2d 495 (2d Cir. 1975), from the fact that the drugs were trucked from Long Island to Philadelphia that they passed through the Southern District. Compare the findings of venue on similar showings in *United States* v. *Leong*, 536 F.2d 993 (2d Cir. 1976) and *United States* v. *Panebianco*, Dkt. No. 76-1132, slip op. 119, 131 (2d Cir., October 14, 1976). Second, the receipt of the two Dr. Johnson letters in New York by Fernald may well have been a "misrepresentation, . . . deception, and subterfuge" proscribed by the statute, since nothing in the record indicates that Fernald, albeit a co-conspirator, knew or believed that the letters were forgeries. Indeed, the defendants' description of their relationship with Johnson may well have caused Fernald to draw the conclusion that Johnson was a part of the scheme. (Tr. 710-11, 956).

tivities were sufficient to subject them to prosecution in this district.* As indicated above, each of them made at least one trip into the Southern District of New York to commit acts that were clearly accessorial to the continuing effort to "obtain" the drugs by illicit means, and, further, sent forged "Dr. Johnson" letters to Wingate in New York for subsequent transmittal to Vitarine. The law in this circuit is clear that a defendant may be convicted if he committed accessorial acts within the district even if the crime culminated elsewhere. *United States* v. *Bozza*, 365 F.2d 206, 221 (2d Cir. 1966); *United States* v. *Gillette*, 189 F.2d 449, 451 (2d Cir. 1951). Indeed, the facts in *Gillette*, in which the defendant merely committed certain acts in the Southern District of New York preparatory to a subsequent interstate shipment between the Eastern District of New York and Illinois of counterfeit securities, are controlling here. The Court noted that even though the substantive offense was not committed in the Southern District of New York, the preparatory acts of the defendant committed in that District were sufficient to subject him to venue there. It thus follows, *a fortiori*, that in this case, where the preparatory acts committed in the Southern District consisted of such essential elements of the crime as the holding and trans-

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* Both Pastor and Weiner were charged as aiders and abettors in the indictment on counts five and six, even though such a specific designation in the indictment is unnecessary. *United States* v. *Bommarito*, 524 F.2d 140, 145 (2d Cir. 1975); *United States* v. *Taylor*, 464 F.2d 240, 242 n.1 (2d Cir. 1972). The fact that the Government relied on a theory of *Pinkerton* v. *United States*, 328 U.S. 640 (1946), as a ground for finding venue is irrelevant. In the very recent decision of *United States* v. *McDougal-Pena*, Dkt. No. 76-1320, slip op. 675, 680 (2d Cir. December 1, 1976), this Court relied on *Pinkerton* and aiding and abetting, *in the alternative*, to find sufficient evidence to support substantive convicitons. It follows *a fortiori* that this Court is empowered to do so on the issue of venue.

mittal of the key fraudulent misrepresentations necessary to obtain the drugs, venue in the Southern District was proper. See also *United States* v. *Bommarito*, 524 F.2d 140 (2d Cir. 1975) (source of amphetamines held prosecutable in the Southern District even though he merely sent the drugs from Florida to New York, and never entered the District himself).

POINT III

Pastor Deliberately Absented Himself From His Trial. The Court Properly Impanelled The Jury In His Absence.

On May 17, 1976, the Court directed Edward Pastor, who was present at that time, to appear the following day for selection of a jury and commencement of his trial. Tr. 144; Op. #45369, p. 11. On the morning of May 18, 1976, Pastor failed to appear at the scheduled impanelling of the jury. The Court, finding his absence a deliberate attempt to frustrate its orders, impanelled a jury in his absence and directed the marshals to bring him to Court.* Pastor now claims the Court committed reversible error by violating his right under the Sixth Amendment and Rule 43, Federal Rules of Criminal Procedure, to be present while the jury was chosen. This argument is without merit. The record fully supports the Court's specific finding that Pastor voluntarily absented himself during the jury selection and that the

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* This order apparently was not immediately carried out. (Tr. 176).

interests of the public clearly outweighed the rights of the wilfully absent defendant.*

A. Prior delay of the trial

The trial of Pastor and Weiner was plagued by delay from the outset. Op. #44354, p. 2, dated April 6, 1976. The original Indictment was filed on July 31, 1975, and on August 18, Pastor was arraigned. On September 10, 1975, Pastor was hospitalized complaining of chest pains. He was subsequently released on September 20, 1975.**

On September 22, 1975, counsel for Pastor appeared before Judge Motley for the first time and reported he could not speak to his client for a few days. September 22, 1975, Tr. 16-17. The Court allowed additional time for motions and set a trial date for January 15, 1976. September 22, 1975, Tr. 27. This date was subsequently adjourned by the Court to February 17 as a result of additional motions filed by Pastor. See Op. # 45369, at pp. 2-4. On February 13, 1976, counsel for Pastor informed the Court he was not "fully" prepared for trial on February 17 and that he had called his client that day and was informed that he was being given oxygen and

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* The finding and conclusions of the Court are fully set forth in Op. #45369, filed on November 16, 1976. It should be noted that this opinion was filed after the appellant's brief was filed with this Court on November 15. The Court, at the conclusion of the hearing on this question on September 17, 1976, had, however informed counsel that a written opinion would be filed. September 17, 1976, Tr. 157.

** Pastor had suffered a serious heart attack in 1966 and was subsequently hospitalized in 1968, 1972 and 1974 with chest pains. The pains resulted from angina pectoris. Pastor did not suffer a heart attack after 1966. Tr. September 17, 1976, Tr. 8.

that hospitalization might be required.* February 13, 1976, Tr. 5-7. Counsel implied to the Court that if the trial went forward as scheduled, Pastor would be in the hospital and not in Court. February 17, 1976, Tr. 175.** The Court ordered Pastor to be present in Court on Tuesday, February 17, for the commencement of a hearing on his fitness to stand trial. February 13, 1976, Tr. 49-50, 54. Op. #45369, p. 6. The Court intended to proceed immediately to trial should it find Pastor able to do so.*** *Id.* at Tr. 50-51.

On February 17, 1976, Pastor did not appear as directed. The day before, he had been admitted to a hospital in Philadelphia. February 17, 1976, Tr. 1-4. His condition was diagnosed as mild congestive heart failure.**** Op. #45369, pp. 6-7. The Court proceeded with the intended hearing and directed the Government and defense to have further examination of Pastor completed and the witnesses prepared to testify on Monday, February 23, 1976. February 17, 1976, Tr. 180-82, 192-93.

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* Counsel was unable to respond to the Government's request for reciprocal discovery on the same day because he did not know what documents the defendant might introduce in his defense. Affidavit of John W. Timbers, Assistant United States Attorney, dated March, 1976.

** Despite Pastor's increasing heart trouble as trial approached, he managed to appear voluntarily before the Federal Trade Commission on January 14, 1976 and give testimony there. Affidavit of John W. Timbers, Assistant United States Attorney, dated May 6, 1976; Tr. 651-53, 884-85.

*** At that time, the Court had a report from the Government's expert saying Pastor would be able to stand trial, and a contrary report from a doctor hired by the defendant. February 13, 1976, Tr., p. 54.

**** This condition occurs when the heart does not pump blood through the lungs and other parts of the body efficiently. A person in Pastor's condition could self-induce this condition by ingesting substantial amounts of liquids. Affidavit, John W. Timbers, Assistant United States Attorney, dated March, 1976.

On February 23, 1976, Meyer Texon, M.D., the Government expert, testified that he had examined Pastor in Philadelphia and, while Pastor had not suffered a myocardial infarction, he did find excessive fluid in the lungs which may have been caused by a failure of the heart to pump blood through the lungs. Texon recommended Pastor remain in the hospital for 10 days for further analysis. The Court adjourned the trial until May 17, 1976. February 23, 1976, Tr. 1-2, 8.

In late March 1976, it became clear to the Court that Pastor's counsel was himself ill and might require hospitalization. In order to avoid further delay, the Court notified Pastor by letter that the trial would not be adjourned and he was directed to engage other counsel to be prepared to try the case should present counsel be unable to proceed. Op. #44410, dated May 14, 1976; letter dated March 31, 1976, attached. In addition, the Court instructed Pastor through his counsel that the Court would pay for the additional attorney if Pastor could not afford it. April 1, 1976, Tr. 8. A month later, on April 30, 1976, Pastor moved for an adjournment of the May 17 date for a three month period based on the illness of his attorney. This motion was denied. Op. #44354, dated April 6, 1976.* Despite the Court's direction, Pastor did not retain additional counsel. Indeed, no other attorney at original counsel's firm prepared himself to try the case until May 14, 1976. Tr. 180-182; Op. #45369, p. 7-8.

B. The defendant Pastor's condition

Pastor suffered a myocardial infarction in 1966. February 17, 1966, Tr. 33; September 17, 1976, Tr.

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* Reconsideration denied, Op. #44410, dated May 14, 1976; mandamus petition denied, *see*, Op. #45369, p. 9.

Op. # 44354 is mistakenly dated April 6, 1976 as it refers to an April 26, 1976 affidavit. It was filed on May 6 and should probably be dated that day.

8.* He had not suffered an attack of this kind since 1966. February 17, 1976, Tr. 40, 52, 54, 72-73; September 17, 1976, Tr. 17-19.

The 1966 attack resulted in the substantial obstruction of the three major arteries leading into Pastor's heart. Op. #45369, p. 9. While subsequently the collateral arteries developed sufficiently to deliver added blood to the heart, the supply was insufficient for all but sedate activity. February 17, 1976, Tr. 57-59, 93-94. This condition has resulted in recurring episodes of angina pectoris.** Frequent attacks of anginal pain is a condition Pastor has been required to live with since 1966. Despite the fact he has endured hundreds of these attacks, there had been no additional damage to the heart muscle during this ten-year period. February 17, 1976, Tr. 53-54, 120, 166; September 17, 1976, Tr. 17-19. Angina pain is not itself permanent and is alleviated by rest and medication.*** The permanent effect is due to the advance of the underlying disease—arteriosclerosis—which is not itself affected by the stress and tension of standing trial. February 17, 1976, Tr. pp. 72, 168-69.

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* Myocardial infarction is damage or death of a portion of the heart muscle which is almost invariably due to a narrow artery or arteries supplying blood to that portion of the heart muscle. February 17, 1976, Tr. 33-34. The underlying disease is arteriosclerosis, i.e., hardening or narrowing of the arteries, a condition existing in all humans to some degree. *Id.* at p. 92.

** Angina pectoris is characterized by chest pains due to an imbalance between the heart's requirement for oxygen and the supply produced by the blood coming into the heart. Anginal pain due to insufficient blood flow is sometimes referred to as ischemia. February 17, 1976, Tr. 33-37.

*** Nitroglycerine tablets arrest the pain almost immediately, Op. #45369, p. 10.

Based on the testimony of the Government expert, the Court ruled that Pastor was able to stand trial. But, realizing that angina attacks are serious in themselves, particularly if untended to or encouraged and in the light of counsel's own physical difficulties, the Court *sua sponte* shortened the intended trial day to four hours including recesses. As an added precaution, the Court ordered an examination of Pastor every second day during trial. The Court extended the opportunity to Pastor's counsel either to have his doctor present at these examinations or to conduct separate examinations, but no such arrangement was made by Pastor or his counsel. Op. #45369, pp. 9-10, 31.

C. The Court's finding

At 10 A.M. on the morning of May 18, 1976, Pastor was admitted to the coronary care unit of Mount Sinai Hospital complaining of chest pains of long duration unrelieved by rest or medication. The consensus of medical opinion was that this was the advisable action to take under these circumstances. The diagnosis of Pastor's condition at any one time ultimately depended on Pastor's word as to the severity of the pain. (September 17, 1976, Tr. 11, 34-38, 42-48). The tests conducted on May 18 and thereafter, standing alone, were consistent with either pain or no pain. (September 17, 1976, Tr. 25-26). They did, however, clearly show that there was no damage to or change in the condition of Pastor's heart.*

* The Court continued the hearing on Pastor's ability to stand trial on September 17, 1976, after the trial. The Government expert concluded that Pastor had suffered only angina pain and could attend trial on May. 20. Op. #45369, p. 18-19.

The Court rejected Pastor's uncorroborated ve[r]sion of the facts. Op. # 45369, p. 27. It found that Pastor suffered only angina pain on the morning of May 18, if indeed he suffered any pain at all, and that the angina was no more serious than similar attacks Pastor had come to have on an almost daily basis. The Court also concluded that statements by Pastor to the contrary were untruthful and his failure to appear was a deliberate attempt to frustrate the Court. Op. #45369, pp. 28-30, 32.

The record further showed that on the morning of May 18, Pastor knew, because he was informed by his own doctor, that anginal pain which lasted more than 10-15 minutes was a serious matter requiring immediate medical attention. September 17, 1976, Tr. 55-58. Despite the fact he claimed to have been suffering crushing pain at 7 a.m. on May 18, he did not enter a hospital until nearly 10 a.m. September 17, 1976, Tr. 20.* Pastor did not contact his own doctor until 8:45 a.m., nearly two hours after he began experiencing crushing pain, despite the fact that his doctor has previously indicated his availability for such emergencies and was in fact available at that time. Op. #45369, p. 10, 15-16; September 17, 1976, Tr. 81-82, 86. In the interim, Pastor called his attorney, who attempted to get the Government's doctor to verify the situation. Op. #45369, p. 31-32. Pastor's concern for what the Government doctor would say was entirely inconsistent with the actions of a man undergoing a heart attack of any significant dimension but consistent with the acts of a malingerer.

In support of an earlier application for adjournment of the trial, Pastor's doctor submitted a report to the

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* It should be noted that Pastor's wife, who was with him throughout this period is a nurse. Op. # 45369, p. 16.

Court relating that Pastor had suffered angina pain of long duration accompanied by heart palpitations on May 8 and 10, 1976. The Government doctor interviewed and examined Pastor on May 9, 1976. Pastor completely failed to mention the serious pain and palpitations he had supposedly had the day before. Op. #45369, pp. 13-14.

D. Discussion

From these facts, it is exceedingly clear that the District Court acted entirely properly in the face of the difficult situation confronting her. It is undisputed that a defendant in a criminal case has a right of constitutional dimension to be present at all phases of a trial, *Taylor* v. *United States*, 414 U.S. 17 (1973); Rule 43(a), F. R. Crim. P., and particularly during the impanelling of a jury. *Lewis* v. *United States*, 146 U.S. 370, 378 (1892); *United States* v. *Toliver*, 541 F.2d 958 (2d Cir. 1976); *United States* v. *Crutcher*, 405 F.2d 239 (2d Cir. 1968), *cert. denied*, 394 U.S. 908 (1969). The issue on this appeal, however, is whether Pastor voluntarily and knowingly waived that right. The District Court emphatically concluded that Pastor's failure to appear for trial on the morning of May 18, 1976, was a deliberate ploy—indeed, the last in a series of delay-producing actions—designed to postpone or avoid the trial altogether. This conclusion is firmly supported by both the facts and the law.

Initially, it should be noted that the findings of fact by the District Court—contained in a long and careful opinion, and reached after an extensive hearing as well as seeing the entire series of facts develop before her—must be accepted by this Court upon review in the absence of a showing that it was clearly erroneous. See, *United States* v. *Lucchetti*, 533 F.2d 28, 36 (2d Cir. 1976) (finding of voluntariness of waiver subjected to "clearly erroneous"

standard); See generally, *United States ex rel. Delle Rose* v. *LaVallee*, 468 F.2d 1288, 1290 (2d Cir. 1972), *rev'd on other grounds*, 414 U.S. 1014 (1973); See also *United States* v. *Gottfried*, 165 F.2d 360, 367 (2d Cir.), (L. Hand, J.), *cert. denied*, 333 U.S. 860 (1948); 3 Wright, *Federal Practice and Procedure*, § 675, p. 130 (1969). Furthermore, Judge Motley's conclusions were fully supported by the record. In addition to the long history of delays, largely caused by Pastor, that has been recounted here; to the District Court's specific conclusion, based on the evidence, that she did not believe Pastor's proffered explanation for his absence at the commencement of trial; and to the fact that Pastor's actions on the morning of May 18, 1976, were simply inconsistent with those of a seriously ill man, the record itself demonstrates Pastor to be a malingerer exaggerating his condition for his own purposes.

Although one would think the attorneys for Pastor who were vigorously arguing his state was so fragile that the stress of a trial might kill him would be solititous of his well being, the record is contrary. During the trial, counsel for Pastor shouted and so generally carried on in Pastor's presence that the Court, who heard this from an adjoining room, felt it necessary to intercede. (Tr. . .). Pastor, who professed to be taking diuretics to avoid congestive heart failure, was continuously drinking water in the Court's presence. (Tr. 852). In addition, Pastor attempted to manipulate his condition to curry favor with the jury, first, by elaborately displaying the great number of pills he was taking, then by conspicuously displaying the hospital identification wrist band he was wearing. and finally by wearing a light shirt through which the jury could plainly see electronic nodes which were used to monitor his condition, until the Court, observing this, put a stop to it. Op. #45369, pp. 30-31.

Equally significantly, the law in this Circuit and elsewhere firmly supports the manner in which the District Court chose to act in the difficult situation confrontng her. In *United States* v. *Tortora*, 464 F.2d 1202 (2d Cir.), *cert. denied*, 409 U.S. 1063 (1972), this Court squarely faced the question whether a trial can proceed in the complete absence of a defendant:

> "A defendant who deliberately fails to appear in court does so voluntarily, and thus the important question is whether his absence can be considered a 'knowing' waiver. We hold that it can. The deliberate absence of a defendant who knows that he stands accused in a criminal case and that the trial will begin on a day certain indicates nothing less than an intention to obstruct the orderly processes of justice. No defendant has a unilateral right to set the time or circumstances under which he will be tried. See, *United States* v. *Bentvena*, 319 F.2d 916 (2d Cir.), *cert. denied*, 375 U.S. 940 (1963)."

Id. at 1208. *Tortora* supports the conclusion not only that presence at trial may be waived, but also that this waiver may be inferred from the circumstances and from the defendant's activities. See also, *United States* v. *Taylor*, 478 F.2d 689 (1st Cir.), *aff'd* 414 U.S. 17 (1973); *Phillips* v. *United States*, 334 F.2d 589, 592 (9th Cir. 1964), *cert. denied*, 379 U.S. 1002 (1965); *United States* v *Marotta*, 518 F.2d 681, 684 (9th Cir. 1975); See generally, *Diaz* v. *United States*, 223 U.S. 442, 450-451 (1912); *Illinois* v. *Allen*, 397 U.S. 337, 343 (1970); *United States* v. *Peterson*, 524 F.2d 167, 183-86 (4th Cir. 1975), *cert. denied*, 423 U.S. 1088 (1976).*

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* Nor, as Pastor implies in his brief at 20, does the *Tortora* rule disappear if the defendant proffers "some sound reason" for his absence, *United States* v. *Tortora*, supra, 464 F.2d at 1208,

[Footnote continued on following page]

Indeed, this case is controlled *a fortiori* by *Tortora*, since the trial judge's determination in this case was founded not only on the silent but eloquent absence of the defendant at the time of trial, but also on the long history of delays preceding the trial date.*

The cases upon which Pastor heavily relies are distinguishable. In both *United States* v. *Toliver*, *supra*, and *United States* v. *Crutcher*, *supra*, this Court explicitly noted that there was *no* indication that the defendant waived his right to presence at trial. *United States* v. *Toliver*, *supra*, 541 F.2d at 964;** *United States* v. *Crutcher*, *supra*, 405 F.2d at 242 (no evidence that the defendant "was advised of, or waived, his right to be present.") These cases, and others of like nature cited in Pastor's brief, stand only for the acknowledged proposition that presence at trial is an important constitutional right; they simply do not deal with the circumstances under which a waiver may be found and where the District Court may properly proceed.

Finally, it should be noted that the District Court in this case properly exercised the discretion vested in

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if that reason is incredible. See, *United States* v. *Davis*, 486 F.2d 725, 727 (7th Cir. 1973), *cert. denied*, 415 U.S. 979 (1974). The unbelievability of Pastor's claims was explicitly found by the District Court, and was supported by the record. See also, *United States* v. *Partlow*, 428 F.2d 814, 815 (2d Cir. 1970).

* The *Tortora* decision lists as an important prerequisite that the defendant receive clear and actual notice that the trial will commence on a date certain. 464 F.2d at 1209. Since Pastor was explicitly told on the afternoon of May 17 that the trial would commence with the selection of the jury the following morning, this requirement is clearly met. Indeed, Pastor does not claim that he did not know that the trial was to commence on that date.

** Indeed, the Government in *Toliver* conceded that there was no waiver. See 541 F.2d at 964.

her, *United States* v. *Tortora*, *supra*, 464 F.2d at 1210, in determining that the public interes in having the case go forward outweighed the right of the voluntarily absent Pastor. Op. #45369, pp. 33-34.* The case had already been subject to delays of nearly a year. It was clear that if the case did not go ahead, it would be subject of further long adjournment. Weiner, the co-defendant, was present and entitled to have the Court proceed as to him. A severance would have required the Government and the District Court to try a three week case twice. The Government's principal witness, Horace Johnson, was an elderly and enfeebled alcoholic, so that a delay of Pastor's trial may have left the Government without a crucial witness. Op. # 45369, p. 33. And, in any event, it was likely that Pastor would continue to mislead the Court and seek further delay by similar tactics. In addition, the Court was, of course, subject to the increasingly severe rules requiring the prompt disposition of criminal cases, see 18 U.S.C. §§ 3161, *et. seq.*, as well as an already overloaded and difficult calendar of other criminal cases.**

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* The factors the *Tortora* Court indicated should be considered in making this determination squarely apply in this case:

> "He [the District Court] must weigh the likelihood that the trial could soon take place with the defendant present; the difficulty of rescheduling, particularly in multiple-defendant trials; the burden on the Government in having to undertake two trials, again particularly in multiple-defendant trials where the evidence against the defendants is often overlapping and more than one trial might keep the Government's witnesses in substantial jeopardy."

464 F.2d at 1210 (footnote omitted).

** Of lesser, but some, concern, is the disruption of the operation of the Court where 25 other District Judges are also dealing with matters before them. The Court here had ordered an unusually large panel of 50 veniremen who were actually seated in the court room at the time Pastor failed to appear. In addition, because the Court had been assigned a particularly small court room on the 27th floor of the Courthouse for trial, it had made special arrangements for the selection of a jury in a larger court room on the third floor, at the temporary inconvenience of another judge. Op. #45369, p. 11-12.

In short, the District Court acted entirely properly in this case under the circumstances presented to her by the defendant. Pastor's arguments to the contrary should be rejected.

POINT IV

The Wingate And Vitarine Documents Were Properly Admitted Into Evidence.

During the course of the trial, the District Court admitted into evidence certain invoices, order and shipping forms, and ledger books maintained by Wingate and Vitarine indicating the sale of certain drugs to "Dr. Horace Johnson c/o Edward Pastor" and showing credits to a "Johnson" account. Weiner's arguments that these documents were inadmissible—largely on the ground that Fernald was not a "trustworthy" source for demonstrating the business nature of the documents for purposes of F. R. Evid. 803(6)—are frivolous.

Initially, it should be noted that quite contrary to Weiner's argument, the documents in question were not hearsay at all.* Fernald, who testified at length and was subject to cross-examination, identified each of the documents, testified as to how he caused them to be made, and described the role each of the documents played in the scheme to divert drugs to Pastor and Weiner. Since the making and use of the documents were themselves steps in the conspiratorial scheme, each entry "is not hearsay because what is probative is the mere existence of the entry rather than the meaning intended by the

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* Concededly, the prosecutor argued to the trial court that the documents were business records—a position that was itself entirely correct, and that we discuss, *infra*, as an alternative argument.

writer." *United States* v. *Panebianco*, Dkt. No. 76-1132, slip op. 119, 134 (2d Cir., October 14, 1976);* see also *United States* v. *Ruiz*, 477 F.2d 918, 919 (2d Cir.), *cert. denied*, 414 U.S. 1004 (1973); *United States* v. *Ellis*, 461 F.2d 962, 970 (2d Cir.), *cert. denied*, 409 U.S. 866 (1972); *United States* v. *Garelle*, 438 F.2d 366, 368 (2d Cir. 1970), *cert. dismissed*, 401 U.S. 967 (1971). Indeed, this is simply not the classic business records situation, where a "custodian or other qualified witness," F. R. Evid. 803(6), who has no knowledge of the underlying facts, merely identifies documents and the circumstances of their being made and retained—in which case demonstration of trustworthiness is peculiarly necessary. Rather, since "the [witness] who had personal knowledge that the transaction occurred was present in court to be questioned about the documents," *United States* v. *Marchisio*, 344 F.2d 653, 670 (2d Cir. 1965), there was no hearsay problem at all. See also *United States* v. *Bennett*, 409 F.2d 888, 894-95 (2d Cir. 1969) (no hearsay if declarant is "open to cross-examination on the underlying facts . . . . ").

Furthermore, it is clear that the District Court was entirely justified in allowing the documents into evidence on the theory explicitly articulated at trial, that is, as business records. It is settled that the trial court has "a broad zone of discretion in determining the admissibility of business records," and that the Court's ruling will not be disturbed unless it can be shown that that discretion has been abused. *See, e.g., United States* v. *Fendley*, 522

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* Indeed, that portion of the documents that indicated Dr. Horace Johnson ordered the drugs and had a valid DEA registration number simply could not have been introduced to prove "the truth of the matter asserted," F. R. Evid. 801(c), since it was the position of the Government that these statements were false and fraudulent.

F.2d 181, 184 (5th Cir. 1975); *United States* v. *Ottley*, 509 F.2d 667, 674 (2d Cir. 1975); *United States* v. *Miller*, 500 F.2d 751, 754 (5th Cir. 1974); *United States* v. *Gottlieb*, 493 F.2d 987, 992 (2d Cir. 1974); *United States* v. *Middlebrooks*, 431 F.2d 299, 302 (5th Cir. 1970).

It is equally true that in the trial court's discretion, business records can be admitted despite the fact that the source of the records or the method and circumstances of their preparation have been impeached. *See, e.g., United States* v. *Re*, 336 F.2d 306, 313-14 (2d Cir. 1964). Nor does the fact that the method and circumstances of preparation of the documents may, as Weiner contends, have been unreliable or "vicious" and based totally on the whim and caprice of Fernald, render the documents inadmissible. Indeed, *United States* v. *Re*, *supra*, is strikingly similar to this case in that the defendants there challenged on appeal the admission of documents of a business engaged in unlawful activities and which similarly contained numerous irregularities. Arguments against their admissibility were rejected in language particularly appropriate to this case.*

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* This Court noted:

"The fact that Birrell's business of distributing unregistered shares of Swan-Finch was unlawful does not affect the admissibility of his records as kept by De Risi '[The business records exception to the hearsay rule] does not discriminate between lawful and unlawful businesses.' *United State* v. *Quick*,

* * *

". . . irregularities . . . such as the informality of the abbreviations, . . . possible inconsistencies, . . . inaccuracies, . . . or incompleteness, . . . have not precluded admissibility, but have been factors for the jury to evaluate in considering the writing along with the other evidence."

* * *

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Weiner argues that although at one time the business records rule supported Judge Motley's ruling in this case, that the untrustworthiness of the source of information or the method of preparation of the document went to the weight and not the admissibility of the document, the rule has been changed by Rule 803(6) of the Federal Rules of Evidence.* Weiner argues that under Rule 803(6), it was reversible error for Judge Motley not to have determined that the documents were so untrustworthy as to require their exclusion. Although Rule 803(6) requires the trial court to determine if the source of information or the method or circumstances of preparation indicate lack of trustworthiness before the business record can be admitted in evidence, Rule 803(6) has not diminished the discretion accorded the trial court to admit the record.**

"It is, of course, true that records kept in the course of Birrell's enterprise do not fall into the category of the usual set of books in the offices of legitimate commercial or industrial enterprises. Birrell's 'business' 'occupation' or 'calling', however, was not of the usual orthodox nature . . .

"To effect his stock transactions Birrell apparently thought it necessary to keep some records . . . The Birrell books through De Risi were subject to *voir dire* and *cross* examination. The jury was made aware of the strength and weaknesses of the entries. There was no error in admitting the books in evidence." 336 F.2d at 313-14.

* Weiner also relies on *Palmer* v. *Hoffman*, 318 U.S. 109 (1943), a decision concluding that certain records were not business records. To the extent that that decision hinged on the untrustworthiness of the provider of information, it is distinguishable. As this Court noted, the records were "dripping with motivations to misrepresent." *Hoffman* v. *Palmer*, 129 F.2d 976, 991 (2d Cir. 1942). Fernald, especially at the time of his participation in the scheme, obviously had no motive to falsify the documents other than at the request of the defendants.

** Judge Weinstein specifically articulates this principle in his treatise. Referring to the nationale behind the inclusion of the condition in Rule 803(6) that records made in the ordinary course of business are admissible "unless the sources of information or

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Judge Motley examined the Wingate and Vitarine documents and concluded that they were business records. The court did not err in leaving to the jury the responsibility of weighing the documents along with other evidence at trial.*

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other circumstances indicate lack of trustworthiness", Judge Weinstein noted that:

> "... *problems of motivation are to be dealt with on a case to case basis.* The factors previously considered by courts can, of course, continue to be employed. In addition, a number of other considerations may be appropriate in light of other aspects of the federal rules. Rule 401's emphasis on relevancy and Rule 102's endorsement of accurate determinations as a primary goal, indicate that as a general matter the rules favor making all relevant evidence available to the trier of fact. Even when the facts of a case disclose the possibility of a motive to misrepresent, the court should be careful to see whether this paramount aim cannot be met by reducing the dangers that might arise from the admission of the record. If the declarant is available, for instance, the court may insist that he be called if the record is to be used so that his credibility can be examined ...
>
> In short, if the judge finds that the record may be helpful to the jurors and that they should be able to discount its untrustworthy aspects with adequate instructions, the judge should admit the record. *Assessment of probative force should, whenever possible, be left for the jury.* The jury's function should not be reduced by excluding relevant evidence unless the court is reasonably assured that the result of the litigation will be less reliable if the evidence is revealed to the jury." 4 Weinstein and Berger *Evidence* ¶ 803 (b)[05], at 803-166-67. (Emphasis added and footnotes omitted.)

* *United States* v. *Robinson*, Dkt. No. 76-1177, slip op. 333, 340-41 (2d Cir., October 29, 1976), cited by Weiner, states that "the question of trustworthiness is a crucial threshold issue of law going to admissibility, and it must be resolved first by the trial judge before it becomes a question of weight for the jury." However, the record in this case indicates that Judge Motley made

[Footnote continued on following page]

POINT V

The Admission Into Evidence Of Government Exhibit 35 Was A Proper Exercise Of The Court's Discretion And Was Not Error.

Joseph Vigna, a Special Agent of the Drug Enforcement Administration, was called as the Government's final witness and described in detail a chart or listing of the trial exhibits summarizing the various purchases of phendimetrazine and phentermine. (GX 35; Tr. 1733-1735, 1761-1796). This chart or summary consisted of 15 pages listing those exhibits chronologically. Each page was headed by a date and description of a sale of drugs. The chart or listing had the effect of juxtaposing the documents reflecting the drug sales and Dr. Johnson's letters with the telephone records of the defendants, demonstrating the contacts between the defendants and others involved in the transaction.

Weiner, relying on Rule 1006, Federal Rules of Evidence, alleges error in that summaries were only permissible when the documents upon which they are based are *not* in evidence in the same proceeding. This argument is frivolous.*

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a threshold determination as to trustworthiness and properly admitted the documents. *Robinson* is further distinguishable since that case involved testimony of the "*absence* of public record or entry" under F. R. Evid. 803(10). Under that exception to the hearsay rule, which specifically requires a "diligent" search, and unlike the business records exception, the trier of fact is confronted solely with an ultimate conclusion—that is, a statement that a search was made and no records were found. In that situation, unlike the present case where both the records themselves and the circumstances of their being made were open to inspection by the jury, the jury is totally dependent on the trustworthiness and reliability of the person making the search.

* Appellants also argue that the underlying documents must, in fact, *be* admissible, relying principally on their attacks on the "Wingate" invoices to succeed. See Point IV, *supra*, and Point I in the Weiner brief.

The admission of charts and summaries is discretionary with the trial judge and is subject to review only upon a clear showing of abuse and resulting prejudice to the opposing party. *United States* v. *Ellenbogen*, 365 F.2d 982-988 (2d Cir. 1966), *cert. denied*, 386 U.S. 923 (1967); See also, *United States* v. *Cummings*, 468 F.2d 274, 278-80, (9th Cir. 1972). The admission of charts for the purpose of summarizing facts contained in other exhibits in evidence is entirely proper.* *United States* v. *Nathan*, 536 F.2d 988, 992 (2d Cir. 1976); *United States* v. *Silverman*, 449 F. 1341, 1346 (2d Cir. 1971), *cert. denied*, 405 U.S. 918 (1972).

Weiner, not surprisingly, cites no authority for the proposition that Rule 1006 was intended to exclude the use of summaries when the underlying document were in evidence. The rule, which provides for the admission of summaries when the underlying documents are too voluminous to effectively introduce in evidence, vests the court with authority to demand their production in any event.

Commentary on the Rule is directly contrary to Weiner's position. As Judge Weinstein points out, under Rule 1006, the summaries may be relied upon as evidence in chief *whether or not* the originals are introduced at trial. 5 Weinstein and Berger, *Evidence* ¶ 1006[02] at p. 1006-5.

Traditional arguments against summaries are based on the assumption ". . . that jurors are too stupid to see the drift of evidence". *United States* v. *Johnson*, 319 U.S. 503, 519 (1943) (Frankfurter, J.). The jury here could not possibly have been misled by the notion they must

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* The Court's charge on this point was more favorable than the defendants deserved, instructing the jury that the summary was only a guide and not evidence. (Tr. 2276-77).

accept the inferences drawn by the government summary. All of the points mentioned in the summary were drawn from the exhibits and testimony at trial. (Appellant Weiner's brief at p. 26). The Court properly admitted the exhibit and left any discrepancy between the exhibit and the underlying sources which might have existed to cross examination and summation by the defendants.*

POINT VI

Pastor's Claim That The Evidence Failed To Establish A Crime Within The Intent Of The Statute Is Without Merit.

Pastor next argues that the Government failed to prove the violations of Title 21, United States Code, Section 843(a)(3), charged in Counts Five and Six, in that the false and forged letter and other fraudulent uses of Johnson's name and drug registration number to order controlled substances, did not defraud anyone. This argument is based on the contention that Fernald, Berry and Green were co-conspirators who were not deceived by and did not rely upon those representations. This reading of the record and strained construction of the satute is without merit for two reasons. First, the evidence establishes that although Fernald, Berry and Green were co-conspirators, they did not know that the Johnson letters were forged and, indeed, Green insisted upon such letters signed by Dr. Johnson as a prerequisite to shipping the drugs. Second, Section 843(a)(3) is plainly directed towards frauds against the United States, as well

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* The summary was given to defense counsel five days before it was introduced. Although counsel objected generally to the exhibit, no specific inaccuracies were pointed out before the summary was introduced. (Tr. 1747-50).

as frauds against controlled substances suppliers like Vitarine.

The records plainly establish that the "Johnson" letters used by Pastor and Weiner contained the false information that Dr. Johnson was the purchaser of the drugs in question and the forged signature of Dr. Johnson. (Tr. 1289-91). The proof also showed that Green would not have shipped those drugs to Pastor but for the letters. (Tr. 711-15, 750-51). And, although there was evidence the Green was a co-conspirator with general knowledge of Pastor's scheme to divert the drugs from lawful channels, there was no showing that Green knew that the invoices were false or forged. (Tr. 794). Section 843 (a)(3) provides:

> It shall be unlawful for any person knowingly and intentionally . . . to acquire or obtain possession of a controlled substance *by misrepresentation, fraud, forgery, deception, or subterfuge.*

(Emphasis added). Pastor contends that the emphasized words "imply a direct lie to another person who relies on the lie and is deceived." Notwithstanding Green's conceded knowledge of and participation in the conspiracy to divert controlled substances, the jury could properly draw the inference from Fernald's testimony that neither he nor Green knew that the letters contained false information or forged signatures. (Tr. 711-15, 750-51). Furthermore, assuming, *arguendo*, that Green had known that the invoices were false and forged, still the evidence would have been sufficient to support Pastor's conviction. The furnishing of the invoices to Green was quite obviously designed to provide the requisite documentation in the event of a DEA audit of the books and records of Vitarine and Pastor's use of the false invoices thus constituted a fraud against the United States.

Weiner's claim that the case law establishes that there must be a "direct lie" to another person who himself relies upon that lie in order to spell out a violation of Section 843(a)(3) is frivolous, since the cases he cites demonstrate nothing of the sort.*

In this case, the record unequivocally established that Pastor and Weiner did "acquire" and "obtain possession of" the controlled substances specified in Counts Five and Six by use of "misrepresentation, fraud, forgery, deception" and "subterfuge", to wit, the false and forged Johnson letters and other representations that Dr. Johnson had authorized them to act in his behalf. There is no evidence that Green knew that the letters and representations were not genuine; indeed, the testimony that he would not have caused the shipment of the drugs without the invoices is uncontradicted. Furthermore, there is no

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* *United States* v. *Iacopelli*, 483 F.2d 159 (2d Cir. 1973), did involve a supplier of controlled substance who relied upon Bureau of Narcotics and Dangerous Drugs order form in delivering a controlled substance to the defendant. This Court found that there was sufficient evidence of such reliance and affirmed the defendant's conviction. There was no indication, however, that a defrauded supplier was a prerequisite to a Section 843(a)(3) violation. In *United States* v. *Ruyle*, 524 F.2d 1133 (6th Cir. 1975), *cert. denied*, — U.S. — ( ), the Sixth Circuit upheld the conviction of a registered distributor of controlled substance who filed false reports in violation of Section 843(a)(4), a subsection not involved in the present case. Finally, in *United States* v. *Bass*, 490 F.2d 846 (5th Cir. 1974), the defendant had concealed from two doctors the fact that he was obtaining prescriptions for the same controlled substance from each of them on the same day. There was no evidence, however, as to the materiality of that concealment or its effect, if any, on the cations of either of the doctors. Indeed, one of the doctors had testified that had he been informed of the other's prescription, he might still have given his own, depending upon his examination of the defendant and his perception of his needs. *Id.* at 856-57.

evidence that anyone else at Vitarine knew anything of the Pastor-Weiner scheme. Thus, whether the false Dr. Johnson letters were designed to defraud Green, Vitarine, the United States, or all three, the proof supports the direct causal link between the submission of those invoices and Vitarine's drug shipment to Pastor.

POINT VII

The Evidence That The Drugs Received By Pastor And Weiner Were In Fact Controlled Substances Was Overwhelming.

Weiner next claims that the evidence that the drugs Pastor and Weiner obtained were in fact the controlled substances phendimetrazine and phentermine, as specified in Counts Five and Six, was insufficient. This argument is without merit. Although none of the drugs were introduced into evidence and no chemical analyses of the drugs were ever performed by the Government,* the evidence that the defendants obtained phendimetrazine and phentermine was not only sufficient by overwhelming.

Business records of Vitarine, the manufacturer, of the drug, establishing that the drugs shipped to Pastor were phendimetrazine and phentermine, were in evidence. (12A&B, 14A&B, 15A&B, 16A&B, 17A&B, 19A&B 20A&B, 21A&B; Tr. 302-315). The jury heard testimony concerning the surreptitious negotiations leading up to the shipment in question. (Tr. 435-38, 493, 507-10). Pastor clearly specified in these conversations and in the "Johnson" letters that he wanted phendimetrazine and

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* None of the drugs was ever recovered by the Drug Enforcement Administration.

phentermine. (Tr. 711-15, 750-51; GX 13F, 18E). There is no evidence that the pirce paid for the drugs in question was not appropriate to phendimetrazine and phentermine. Following the deliveries of the drugs, Pastor voiced no complaints that the drugs were anything other than phendimetrazine and phentermine.* All of the evidence tended to establish that the drugs acquired by Pastor and Weiner were phendimetrazine and phentermine. There was no evidence to the contrary.**

It is the well-established law in this Circuit that with respect to substantive violations of the narcotics laws, although the jury must be convinced beyond a reasonable

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* Weiner mischaracterizes the record when the states that there was evidence of complaints and attempts to return the drugs. The complaints in no way related to the chemical composition of the drugs, but rather to the fact that they were in tablet, as opposed to capsule, form and were 35 mg. rather than 100 mg or more. (Tr. 501).

** Weiner attempts to convey the impression that there was some evidence that the drugs shipped might have been caffeinamine. That argument is belied by the record. Thus, the fact that sales of the three drugs were discussed together and shipped together (Tr. 745-745-48, 755-58) simply underscores the conclusion that the parties understood them as separate and distinct drugs. The fact that Berry "boasted" that he could talk fast and confuse certain customers into taking caffeinamine in place of phendimetrazine and phentermine (Weiner Br. 46) lead to the inference that such confusion is difficult to accomplish and that the drugs were not interchangeable. Dr. Johnson's testimony to the effect that he used phendimetrazine and caffeine in his practice (Weiner Br. H. 46) in no way suggests the interchangeability of phendimetrazine and phentermine with coffeinamine. That testimony cannot even be taken to establish that he believed phendimetrazine and carreine were interchangeable, since there is nothing in the record to suggest how Dr. Johnson used those drugs. Moreover, if the drugs in question were truly interchangeable with Caffeineamine, an uncontrolled drug, there is no explanation for the time and effort spent and the risk taken by the conspirators in effecting their scheme, or of the exceptional profits that they stood to make.

doubt that the substance in question is in fact a controlled substance, "[i]t is not necessary that it is be proved by direct evidence." *United States* v. *Ageuci*, 310 F.2d 817, 828 (2d Cir. 1962), *cert. denied*, 372 U.S. 959 (1963); *United States* v. *Iacopelli*, 483 F.2d 159, 161-62 (2d Cir. 1973); *United States* v. *Bentvena*, 319 F.2d 916, 927 (2d Cir.), *cert. denied, sub nom. Ormento* v. *United States*, 375 U.S. 940 (1963). As the *Ageuci* Court went on to state:

> "Just as with any other component of the crime, the existence of and dealing with narcotics may be proved by circumstantial evidence; there need be no sample placed before the jury, nor need there be testimony by qualified chemists as long as the evidence furnished ground for inferring that the material in question was narcotics. See, *United States* v. *Morello*, 250 F.2d 631, 633-34 (2d Cir. 1957)."

Id. at p. 828. The Government "need *not* exclude every remote possibility of innocence before its case warrants submission to the jury." *Id.* at 830; *United States* v. *Iacopelli*, *supra*, 483 F.2d at 162.

Under these principles, and under the facts listed above, Weiner's claim is frivolous.*

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* Finally, Pastor complains that the trial court failed to point out in its charge that the evidence as to the character of the drugs was wholly circumstantial. No such charge is required and Pastor cites no cases in support of this proposition. In fact, it has long been the law in this Circuit that circumstantial evidence is not in any respect probatively inferior to direct evidence. *United States* v. *Lubrano*, 529 F.2d 633, 636 (2d Cir. 1975); *United States* v. *Woodner*, 317 F.2d 649, 651 (2d Cir.), *cert. denied*, 375 U.S. 903 (1963); *United States* v. *Brown*, 236 F.2d 403, 405 (2d Cir. 1956); *Rumely* v. *United States*, 293 Fed. 532, 551 (2d Cir.), *cert. denied*, 263 U.S. 713 (1923). Furthermore, both defendants were given full leeway to argue the insufficiency of the Government's proof to the jury.

POINT VIII

Conduct by the Prosecutor at Trial was Proper, and Did not Deprive the Defendants of a Fair Trial.

Weiner raises a number of arguments that the prosecutor acted improperly during the trial and in summation. On the basis of these claims, he calls for reversal. Weiner's arguments are in the main refuted by the record, and in any event without merit.

Weiner first argues that the Government improperly introduced evidence that the drugs in question had a "street" value of $1 per unit and argued in summation that Pastor and Weiner had illegally diverted the drugs. This evidence and any summation argument fairly inferred from it were entirely proper. The defendants were charged in the conspiracy count with conspiring to "distribute and possess with intent to distribute Schedule III and IV controlled substances." In any event, even without the conspiracy count, the evidence would have been admissible to establish motive and intent on the part of the defendants, a key and disputed issue in the case. See *United States* v. *Papadakis*, 510 F.2d 287 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975).

Counsel for Pastor elicited on re-cross examination of Fernald that he did not mention any sale of controlled substances to Pastor when he was interviewed in October 1973, despite the fact that he was co-operating with the Government at that time. (Tr. 1213-15). The Government then sought to elicit that Fernald had in fact given some information about Pastor during this interview. As these statements constituted information Fernald had received from Berry, Pastor's objections on hearsay grounds were sustained although the Government argued they were not offered for the truth of the

matter stated and were, therefore, not hearsay.* The Government then attempted to elicit whether Fernald had dealt with Pastor after federal agents had told him not to. (Tr. 1231). The Court refused to permit this line of questioning, ruling Fernald had already answered the question when he said the agents said nothing to him about Pastor. (Tr. 1232).

The following colloquy ensued:

> [Prosecutor]: "I have no further questions at this time, but I would make the caveat that there was an area that I did want to go into that I haven't been permitted to and I don't think that—I think that this is going to affect any——
>
> [Pastor's Counsel]: "Objection"
>
> [Prosecutor]: "——recross"
>
> [Weiner's Counsel]: "Objection, your Honor"
>
> [Pastor's Counsel]: "(the prosecutor) shouldn't be making statements like that."
>
> The Court: "No, he should not . . ." (Tr. 1232).

Weiner claims this is reversable erorr because the prosecutor informed the jury he had information the Court was preventing him from conveying. This argument is wholly without merit. While the remark by the prosecutor was improper, there could be no prejudice to either defendant. Even the most liberal and imaginative reading of the remark fails to provide any inference of specific facts beyond the record that would incriminate the defendants; at most, the remark noted that the

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* The Government contended the statements were offered only to show the extent of Fernalds co-operation, a matter explored by defense counsel as cross-examination. (Tr. 1222).

prosecutor felt he was limited in his ability to rehabilitate a witness whose credibility had been attacked. The case is thus utterly unlike those decisions upon which Weiner heavily relies, see, e.g., *Berger* v. *United States*, 295 U.S. 78, 87 (1935), in which the prosecutor specifically and improperly invited the jury to consider or speculate about evidence *dehors* the record. Given the wealth of material with which the defendants could attack Fernald, *see*, *United States* v. *Pacelli*, 521 F.2d 135 (2d Cir. 1975), *cert. denied*, 424 U.S. 911 (1976), the possible impermissible rehabilitation of him was at most harmless.

In addition, Weiner claims a number of errors in the Government's summation. W[illiam]er's argument that the prosecutor personally vouched for the credibility of the Government witnesses (Weiner Br. 48) is clearly refuted by the record. The Government simply and properly pointed out those pieces of evidence it introduced that corroborated its witnesses. (Tr. 2210-12). There was simply no statement of personal belief in the credibility of the witnesses; indeed, the prosecutor noted that the corroborating evidence was "all before you." (Tr. 2210). To claim that a prosecutor should not make such an argument in the face of a vigorous assault on the credibility of a Government witness is disingenous.*

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* Weiner also claims it was error for the Government to argue in summation that neither Pastor nor Weiner had a BNDD license because this statement was untrue. (Weiner Br. 42). No citation to the record is given. In fact, the statement was correct. The record is clear that Weiner was not registered and silent as to Pastor (Tr. 1248-50). See also, second footnote, *supra* p. 6, fn. **. Although several of their various stores were registered, none of the drugs in this case were received by those stores. See supra, p. 4, fn. ***; p. 5 fn.**.

Weiner's further argument that "the prosecutor improperly implied that the defense had an obligation to produce evidence"

[Footnote continued on following page]

Weiner also points out that the prosecution misstated the record when he said in partial response to Pastor's assault on the credibility of the DEA agent who testified as to Pastor's confession, "Remember he asked Mr. Vigna, after he stated what he had done, that he wanted to work out an arrangement where he would co-operate with the Government and the government would not prosecute him. And Mr. Vigna said, 'No dice on that'" (Tr. 2205).* This statement was clearly mistaken and therefore improper, since the evidence had been adduced out of the presence of the jury. However, the mistaken reference simply did not have the potential to deprive the defendants of a fair trial. As this Court has noted, improper prosecutorial comment must be viewed in the "context of the entire trial." *United States* v. *White*, 486 F.2d 204, 2067 (2d Cir. 1973), *cert. denied*,

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is similarly without merit. In Pastor's summation, his lawyer urged that Fernald may have received Dr. Johnson's name and BNDD registration number from Pastor during earlier, legitimate transactions—even though there was not one scintilla of evidence to support this. In response, the prosecutor noted that had that been so, Pastor could have introduced evidence of such earlier transactions but failed to do so. Initially, it should be noted that absolutely no objection to this argument was made in the District Court, precluding review in this Court. (Weiner Br. 44). *United States* v. *Canniff*, 521 F.2d 565, 572 (2d Cir. 1975), *cert. denied sub nom. Benigno* v. *United States*, 44 U.S.L.W. 3398 (Jan. 12, 1976). Furthermore, the remark was entirely proper, since it was clear that the exculpatory evidence, if it existed, could have been produced by one other than the defendant. As this Court has recently noted, a prosecutor can comment on the absence of contradiction of the Government's case where possible contradictory testimony was available from witnesses other than the defendant himself. *United States* v. *Lipton*, 467 F.2d 1161, 1168 (2d Cir. 1972), *cert. denied*, 410 U.S. 927 (1973)." *United States* v. *Armedo-Sarmiento*, Dkt. No. 76-1113, slip op. 305, 317 (2d Cir., Oct. 28, 1976).

* Pastor objected and the Court correctly pointed out this testimony was given in another proceeding, i.e., the *Miranda* hearing. (Tr. 131, hearing Ex. 2, 611, 630, 2205).

415 U.S. 980 (1974); *See also, United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 239, 242 (1940); *United States* v. *Berger*, *supra*, 295 U.S. at 85, 89; *United States* v. *Canniff*, 521 F.2d 565, 571-72 (2d Cir. 1975), *cert. denied sub nom. Benigno* v. *United States*, 44 U.S.L.W. 3398 (Jan. 12, 1976). In the light of Pastor's confession and the overwhelming weight of the other evidence at trial, and in view of the good faith nature the mistake, compare *United States* v. *White*, *supra*; *United States* v. *Santana*, 485 F.2d 365, 370-71 (2d Cir. 1973), *cert. denied*, 415 U.S. 931 (1974) (clearly improper remarks held not to require new trial), the error was harmless.

Finally, Weiner claims that the Government erred in commenting in summation on an apparent variance between the opening of Pastor's counsel and his summation. (Tr. 289, 2189-2190). Pastor, in his opening, stated that the defense would prove that his corporation had every license that they required and "that may change the perspective of things." (Tr. 269). Pastor offered no evidence. The Government proved that while Pastor's pharmacies were licensed, that played no part in the distribution of the drugs. In summation, Pastor did not pursue this point raised in his opening. The Government, in rebuttal, simply pointed out that its evidence that the licensed pharmacies were not used had foreclosed further argument on that point. This was entirely proper since, while it may have responded to the specific offer made by defense counsel, it clearly did not focus on the failure of the defendant to testify. Compare *United States* v. *Alphonso-Perez*, 535 F.2d 1362, 1366 (2d Cir. 1976).

POINT IX

The District Court's Charge Contained No Reversible Error.

Weiner contends that the District Court committed reversible error in failing to charge that the jury should decide who the co-conspirators were; failing to give limiting instructions with respect to Fernald's testimony that had been received subject to connection; in giving a *Pinkerton* charge; and in charging that the jury could convict the defendants on the substantive counts if they found that Fernald had acquired the pills and the defendants aided and abetted him. (Weiner's brief at p. 59-58). These claims are without merit.

The first contention, that the court committed reversible error when it failed to instruct the jury "that they have the right and obligation to determine who the co-conspirators are and that they don't have to be bound by the indictment" (Tr. 2308), is belied by the record and at any rate is without legal substance. As Judge Motley noted in her charge to the jury ". . . an indictment is not proof or evidence. It merely contains a series of accusations . . ." (Tr. 2278). Following the above-mentioned defense request, Judge Motley instructed the jury "And, of course, you must find that Charles Fernald was a member of the conspiracy or a co-conspirator as alleged in the indictment." (Tr. 2312-13). This instruction clearly sufficed in informing the jury that they were not bound by the allegations of the indictment and they must determine who the members of the conspiracy were. Furthermore, since the evidence was overwhelming that Pastor and Weiner dealt with one another, there was simply no possibility that the jury could have failed to find the requisite plurality but for the inclusion of Fernald as a

co-conspirator. *United States* v. *Bommarito*, 524 F.2d 140 (2d Cir. 1975). Finally, since the "theory of the defense" was that Fernald framed them, his being denominated a conspirator—together with the giving of the accomplice charge—obviously helped them.*

Weiner also contend that it was reversible error for the District Court to charge the jury under *Pinkerton* v. *United States*, 328 U.S. 640 (1946 The cases cited by the defendants are inapposite. In *United States* v. *Sperling*, 506 F.2d 1323 (2d Cir. 1974), *cert. denied*, 420 U.S. 962 (1975), the Second Circuit advised that the *Pinkerton* charge should not be given as a matter of course. In particular, this Court cautioned that the *Pinkerton* charge should be avoided when the evidence is strong on substantive counts and the prosecution urges that the conspiratorial agreement should be inferred from the substantive crimes. Such was the case here, since the evidence that Pastor and Weiner conspired together was overwhelming, and the proof on the substantive counts—as indicated by the

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* Weiner also claims that the Court gave no limiting instruction with respect to Fernald's testimony. (Tr. 401, 428, 489). Fernald testified to statements made by Berry, a co-conspirator, concerning acts in furtherance of the conspiracy. The Court, over defense objection, received those statements subject to connection. It is well established in this Circuit and elsewhere that hearsay statements by one conspirator are admissible against another conspirator if a "fair preponderance of the evidence independent of the hearsay declarations" shows the declarations were made in furtherance of the conspiracy and the defendant against whom the statements are offered was a member of that conspiracy. See, Fed. R. of Evid. 801(d)(2)(E); *United States* v. *Wiley*, 519 F.2d 1348 1350 (2d Cir. 1975), *cert. denied*, 423 U.S. 1058, (1976). There is no necessity, absent a defense request, for the court to specifically make that finding. *United States* v. *Geaney*, 417 F.2d 1116, 1120 (2d Cir. 1969), *cert. denied sub nom. Lynch* v. *United States*, 397 U.S. 1028 (1970).

hung jury on some counts—somewhat less so. It is only when there is no direct proof that the defendant committed either the substantive offense or that the defendant was a member of the conspiracy, that giving a Pinkerton charge would constitute reversible error. See *United States* v. *Aloi*, 511 F.2d 585, 597 (2d Cir.), *cert. denied*, 423 U.S. 1015 (1975); *United States* v. *Cantone*, 426 F.2d 902, 904-05 (2d Cir.), *cert. denied*, 400 U.S. 827 (1970). In this case, there was proof that the defendant committed both offenses, and any error in giving the charge could only be harmless. Finally, contrary to Weiner's implication, the *Pinkerton* charge has been consistently reaffirmed by this Court. *United States* v. *Stassi*, Dkt. No. 76-1110, slip op. 247, 254 (2d Cir. Oct. 26, 1976); *United States* v. *Finkelstein*, 526 F.2d 517 (2d Cir. 1975), *cert. denied*, — U.S. — (1976).

Weiner's final contention, that the Court should not have charged aiding and abetting, is also meritless. The argument is that if Fernald was not a co-conspirator then his possession of drugs was not "guilty" and therefore there is no venue in the Southern District. The argument is preposterous and is precluded by the jury verdict. The Court may charge the jury on aiding and abetting whenever the evidence warrants it. *United States* v. *Taylor*, 464 F.2d 240, 242 n.1 (2d Cir. 1972). In this case there was more than sufficient evidence to sustain the aiding and abetting charge contained in the indictment. Furthermore, as this Court has recently had occasion to note, a defendant may be convicted of aiding and abetting an innocent principal. *United States* v. *Rappaport*, Dkt. No. 76-1291, slip op. 423, 431 (2d Cir., Nov. 4, 1976).

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

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Form 280 A. -Affidavit of Service by Mail

AFFIDAVIT OF MAILING

State of New York)
County of New York)

I **Frederick T. Davis** being duly sworn deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

Stating also that on the **20th** day of **December, 1976** he served a copy of the within **two(2) Briefs** by placing the same in aproperly postpaid franked envelope addressed:

Gerald L. Shargel &	**Kuh, Shapiro, Goldman,**
Fischetti & Shargel	**Cooperman & Levitt, P.C.**
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And deponent further says that he sealed the said envelope and placed the same in the mailbox for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York

F T D

Sworn to me before this

20th day of December, 1976.

Gloria Calabrese

GLORIA CALABRESE
Notary Public, State of New York
No. 24-0743340
Qualified in Kings County
Commission Expires March 30, 1977